IN THE
MISSOURI SUPREME COURT

SUPREME COURT NO. SC87022

GENE R. KUNZIE,

Appellant,

v.

CITY OF OLIVETTE, MISSOURI,

Respondent.

CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
CIR. CT. NO. 04-CC-000386
HONORABLE ROBERT S. COHEN

MISSOURI COURT OF APPEALS, EASTERN DISTRICT
APP. CT. NO. ED-85119
HONORABLE CLIFFORD AHRENS, NANNETTE BAKER, GLENN NORTON

APPELLANT'S SUBSTITUTE BRIEF

Respectively Submitted,

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JURISDICTIONAL STATEMENT

Mr. Gene R. Kunzie (appellant), after twenty-three (23) years of service to the City of Olivette (respondent), filed suit against the respondent asserting he was wrongfully terminated and retaliated against in violation of public policy due to his refusal to violate the law. Appellant reported respondent's conduct to city administrators and administrative agencies of the government, that he believed violated federal and state laws, public policy, respondent's municipal ordinances, respondent's employee handbook, and respondent's safety manuals. Appellant avers in his petition that he experienced retaliation for exercising his right to free speech, in "speaking-out" to respondent's public officials and administrative agencies of the government regarding three safety/ accessibility issues. ("Central Issues"): 1. The Dielman culvert's loss of structural integrity, which appellant viewed as a substantial safety risk to the general public; 2. The significant disrepair of respondent's construction backhoe, which appellant believed, placed respondent's employees in harm's way; and 3. The lack of accessibility of the Public Works Building and other municipal facilities to the disabled, including an inadequate number of "disabled" parking spaces and signage.

Through appellant's exercise of free speech, regarding respondent's failure to remedy deficiencies associated with the Central Issues, appellant asserted in his petition he was retaliated against and wrongfully terminated by respondent.

In addition, appellant asserted in his petition he was deprived of contractual rights and retirement benefits by respondent, contrary to respondent's ordinances and prior business practices. As a result, Appellant realized a much lower monthly retirement benefit than he would have received otherwise due to his being terminated before he could retire in the normal course of his career, at age 55 or older. Instead, appellant was terminated by respondent at 51 years of age. In comparison, respondent's other employees, that had previously retired, were provided benefits (i.e. unused sick pay and vacation pay), with appellant not given those same benefits. By respondent not affording appellant those same benefits, appellant asserted in his petition his contractual rights, benefits, and privileges where breached by respondent.

The trial court granted respondent's motion for dismissal without explanation. The trial court's dismissal was prior to the commencement of any discovery in this case. This Court's jurisdiction is premised upon the general appellate jurisdiction provided by Article V, § 3 of the State of Missouri Constitution.

STATEMENT OF FACTS

APPELLANT'S WORK HISTORY

Mr. Gene R. Kunzie, (appellant) began his employment with the City of Olivette (respondent), on August 11, 1980, and continued working with respondent until he was terminated on August 15, 2003. Appellant worked for over 23 years with respondent in ever increasing positions of responsibility, ultimately including the Director of Public Works / Building Commissioner, before his termination. As asserted in appellant's petition, it was not until appellant began expressing his concerns to respondent with reference to three Central Issues (i.e. the lack of Dielman culvert structural integrity, the significant disrepair of the respondent's backhoe, and the lack of access for the disabled), that respondent began to scrutinize and criticize appellant's performance. As plead by appellant, respondent started questioning appellant's credibility and abilities after appellant exercised his right to free speech and openly criticized the respondent's high ranking administrators for their failure to address and remedy the Central Issues. Respondent continued to escalate those acts viewed by appellant as respondent's retaliation, for appellant's legally protected stance on the Central Issues. Appellant's petition asserted appellant attempted on numerous occasions, without success, to get respondent to allocate the appropriate funding from respondent's Council's "pet projects" and promptly remedy the Central Issues. (Record on Appeal -hereinafter "ROA" p. 68, 69)

Respondent's actions, as plead in appellant's petition, resulted in

respondent's: failure to promote appellant; subjecting appellant to significant scrutiny to the level of outward displays of retaliation; respondent did not afford appellant the same benefits and privileges (promotions, pay increases, responsibilities, training, vacation pay, sick leave pay and personal day pay) as other municipal employees that didn't oppose respondent's apparent violation of the law; and ultimately appellant was terminated for raising the Central Issues. Appellant believed that after raising the Central Issues and reporting respondent's continuing violation of the law he was verbally abused, mocked, admonished and humiliated as a form of retaliation. The asserted claim of retaliation took place in respondent's City Council meetings and via e-mails exchanged between respondent's City Council members and high ranking municipal officers, as supported by business records.

Appellant's exercise of his right to "free speech" regarding the Central Issues, and due to what appellant viewed as retaliation, appellant had no choice other than early retirement in light of his termination. (retirement at age 51 versus age 55 or older).

RESPONDENT'S MUNICIPAL ORGANIZATIONAL STRUCTURE

Respondent argued in their motion to dismiss, which was sustained by the trial court (Appendix p. A1), appellant should have exhausted his administrative remedies by filing a complaint with the respondent's Personnel Board of Appeals.(Appeals Board). The Employee Handbook under the heading "Complaints" on page 10 states the following relating to filing a complaint against the "City Manager's " actions: ..."

you may then ask that your complaint be filed with the City Manager. If after that , you feel that you have not been fairly treated and your problem has not been resolved, you may arrange to have your problem reviewed by the Olivette City Personnel Board of Appeals."(emphasis added; ROA p. 93). The Appeals Board review process was not deemed by appellant as mandatory or a prerequisite to filing suit through respondent's Employee Handbook's use of the word "may" arrange an appeal rather than "shall" or "must" engage the Appeals Board for review of a complaint. Further, the Appeals Board solely addressed the actions of the "City Manager" not those actions deemed by appellant as retaliatory action by respondent's at large.

The Appeals Board was empaneled to address issues relating exclusively to the City Manager's "discharge, suspension disciplining..." not respondent's City Council members' whistleblower retaliation, as plead by appellant. The respondent's Appeals Board authority was limited solely to the "City Manager's" actions. The Appeals Board had no authority to address the actions of respondent's other administrators and city council members. Appellant's complaints with the actions of the respondent, as plead, included whistleblower retaliation, wrongful termination, and breach of contract claims which encompassed much more than the action of the "City Manager". (ROA p.155).

ORDINANCES WERE MODIFIED BY RESPONDENT AFTER APPELLANT'S TERMINATION AND IN THE COURSE OF TRIAL COURT PROCEEDINGS

The Appeals Board process, which respondent asserted was appellant's sole

administrative remedy, was revamped within weeks (June 8, 2004) of "Plaintiff's Rebuttal to Defendant's Motion to Dismiss" filed on May 19, 2004. (ROA pp. 91, 154, 155). The respondent amended the Appeals Board process, through amendment of ordinances, sections 20.494 and 20.511. (*See* Appendix p. A2, A3- 11" X 17" comparison of ordinances before and after appellant's memorandum of law was submitted to the trial court). Through the June 8, 2004, amendment, the Appeals Board's role was changed from "advisory" to rendering "final determinations." These changes were raised in appellant's reply to respondent's trial court Motion to Dismiss. This and other changes were highlighted in Plaintiff's Sur-Reply, Exhibit A. (Appendix p. A2, A3). The ordinance changes, adopted by respondent, were deemed untimely by appellant, and should not have deprived appellant of his right to have respondent's motion to dismiss denied as argued to Hon. Judge Cohen. The trial court had jurisdiction over appellant's lawsuit due to that which was asserted by appellant in trial court proceedings as an objectively "defective" Appeals Board process.

RESPONDENT'S "ADMINISTRATIVE REMEDIES" APPEARED CIRCULAR IN THEIR REASONING.

The respondent's administrators, that would have been charged with reviewing appellant's assertion that he experienced adverse employment action and wrongful termination, were appointed to the Appeals Board by the same City Council members that appellant believed retaliated against him. (ROA p. 94, 96; appellant's affidavit ¶ 13A, Appendix p. A4-A6). The ultimate result of an Appeals Board hearing (at the

time of appellant's termination), would have been an "advisory only" opinion back to the City Manager.(ROA p.96 ¶ 13B; ROA p.98). That being Interim City Manager, Kent Leichliter, ("City Manager") that appellant contended was retaliating against appellant. The City Manager was then given the authority to either accept or reject the Appeals Board's "advisory only" opinion.(ROA p.96 ¶ 13 D). In what was viewed by appellant to be circular reasoning, the "City Manager" was authorized to accept or reject the Appeals Board's "advisory" only opinion on the "City Manager's" personnel decisions.

RESPONDENT'S ADMINISTRATORS LEAD APPELLANT TO FURTHER QUESTION THE EXISTENCE OF AN ADMINISTRATIVE REMEDY

Kent Leichliter was not replaced by full-time City Manager, Don Moschenross, until October 1, 2003, six weeks after appellant's termination. (ROA p. 102-103). Additionally, the Appeals Board that would have been empaneled to address appellant's complaints was viewed by appellant as biased against him and defective in that there was one missing "tie breaking"member on the Appeals Board, which was comprised of four (4) members instead of the five (5) members as mandated by respondent's ordinance.(ROA p. 94; ROA p. 96 ¶ 13 F).

As averred in appellant's petition, appellant complained verbally and in writing of: 1. The perceived retaliation arising from appellant's raising the Central Issues; 2. Appellant's protest of his termination; and 3. Appellant's protest of his forced early

retirement through his termination. These communications were contained within numerous written documents. An August 12, 2004, a letter from the Interim City Manger, Kent Leichliter, deemed a form of retaliation by appellant, alleged deficiencies in appellant's performance and established a deadline, (deemed a false deadline by appellant), to provide a response to respondent regarding appellant's alleged performance deficiencies. (ROA p. 109). In appellant's August 13, 2003, response to the City Manager via Inter Office Memo, appellant stated that he was being forced into early retirement, and the topic of a pre-termination meeting held on June 13, 2003, between appellant's counsel and respondent's prior City Attorney, Tom Cunningham, Esq. (ROA 113). The next day, Interim City Manager transmitted a letter dated August 14, 2003, requesting that appellant clarify the intent of appellant's August 13th memorandum:..."in writing, prior to noon on Friday, August 15, 2003." (ROA pp. 114-115). Appellant complied with the Interim City Manager's request as evidenced by appellant's Inter Office Memo dated August 15, 2003, to the Interim City Manager and Human Resources Manager, Diana Deatherage, that appellant was forced into early retirement in an effort to avoid what appellant viewed as a wrongful termination by respondent. (ROA pp. 116-117). In a follow-up letter dated August 19, 2003, the Interim City Manager noted: " I am unable to accept your memo dated August 15, 2003 as a request for retirement. Therefore, as previously stated, your termination is effective August 15, 2003 at 5:00 p.m." (ROA 118). A draft settlement agreement was faxed to appellant's counsel's attention on August 15, 2003. (ROA

pp.119-124). On August 20, 2003, appellant responded to his termination. (ROA pp.125-126). On November 26, 2003, the new City Attorney, Paul Martin, Esq. (who was appointed on October 1, 2003; ROA pp.102-103) responded to appellant's counsel's request for a meeting to resolve the ongoing good-faith dispute relating to appellant's termination. (ROA p.127). The meeting was originally set for December 19th and changed to December 18th with Paul Martin , Esq., the new City Manager, the Mayor, appellant, and appellant's Counsel in attendance.(ROA p. 128). The new City Attorney memorialized the detailed meeting between the parties and their respective counsel in a December 29, 2003, letter. (ROA p.129).

TRIAL COURT PROCEEDINGS

There is no explanation provided by the trial court to the Supreme Court as to the basis for Honorable Judge Cohen having sustained respondent's motion to dismiss, with prejudice. (ROA p. 193; Appendix p. A1). The lack of clarity in Honorable Judge Cohen's order remains despite appellant's filing of a "Motion for Clarification of Judgment." (ROA pp. 190-191). Also contained within that motion was a request to further amend appellant's petition to "cure" any particular deficiencies the trial raised. Appellant's Motion for Clarification of Judgment, was filed with the trial court and denied by Honorable Judge Cohen.(ROA p. 192).

The trial court sustained the respondent's motion to dismiss before appellant was given the opportunity to conduct discovery. Honorable Judge Cohen chose not to disclose that he is a resident (and taxpayer) of the City of Olivette, respondent in the instant matter,

in the scheduling conference held in chambers on the June 15, 2004. (ROA p. 3). Honorable Judge Cohen, later disclosed that he was a resident of the City of Olivette for the first time on July 16, 2004, in the motion to dismiss hearing, long after appellant's right to request a change of judge had expired. (approximately 7 months after the petition had been filed; ROA p. 2). Honorable Judge Cohen sustained respondent's motion to dismiss: without respondent filing responsive pleadings, without respondent producing a single document under discovery, without respondent producing a single affidavit, without respondent producing a single witness to provide testimony by deposition, and without respondent deposing appellant. The only evidence placed into the record was appellant's unrefuted affidavit (ROA pp. 95-97; Appendix pp. A4-A6). The only glimpse of Honorable Judge Cohen's interpretation of the case is captured in a stray note found within the trial court file which was embodied on a small piece of paper. (Appendix p. A7) What is believed to be Honorable Judge Cohen's hand-written note stated as follows:

"<u>Mot Dis</u>.- <u>Subject Matter</u>

1. Fail to exhaust ad rem w/ Olivette per. appeals bd.
2. No c/a as to ct III as private rt of action under Olivette code or regs."

Beyond this notation, there is no insight into the driving force behind Honorable Judge Cohen's dismissal of appellant's third amended petition and sustaining respondent's motion to dismiss with prejudice.

STANDARD OF REVIEW

The respondent filed their motion to dismiss under two theories: first that the trial court lacked subject matter jurisdiction, and secondly, that appellant's claims failed to state a claim upon which relief can be granted. (ROA p. 48). These two theories for dismissal were sustained by the trial on August 27, 2004. Each theory will be addressed separately.

TRIAL COURT'S ALLEGED LACK OF SUBJECT MATTER JURISDICTION

The Appellate Court's standard of review is contained within Missouri Rule of Civil Procedure (M.R.C.P.) 55.27 which establishes the affirmative defense of "lack of subject matter". This rule indicates, "in law or fact, to a claim in any pleading... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter,".....M.R.C.P. 55.27.

The Court of Appeals in *Hiler v. Dir. of Revenue*, 48 S.W.3d 683, 685 (Mo. Ct. App., 2001) stated: "The circuit court's dismissal for lack of subject matter jurisdiction is a question of law which we review de novo." The Court further stated "A court should grant a motion to dismiss for lack of subject-matter jurisdiction whenever it appears that the court lacks such jurisdiction. As the term appears suggests, the quantum of proof is not high. It must appear by a mere preponderance of the evidence that the court is without jurisdiction." *Ryan v. Spiegelhalter*, 2001 Mo. App. LEXIS 819 (Mo. Ct. App., 2001) citing *Two Pershing Square, L.P. V. Boley*, 981 S.W. 2d 635, 639 (Mo. App. 1998) . Appellant asserts that there was no evidence provided by respondent to establish by a preponderance of the evidence that the trial

court was without jurisdiction.

The respondent's burden of proof was not met for no evidence was provided by respondent in support of their motion, for no responsive pleadings were submitted by respondent, no depositions were conducted and no affidavits were submitted by respondent in support of their motion. This case was absolutely devoid of any discovery and the only assertion of fact in this case was provided through appellant's unrefuted affidavit. (ROA pp. 2-4, 95-97; Appendix p.A4-A6).

The only support of respondent's dismissal of the trial court proceeding was respondent's counsel's argument relating to statutory interpretation and erroneous application of the Missouri Administrative Procedure Act (MAPA) to respondent. (ROA pp. 54-56). As the Court of Appeals has noted "Statutory construction is a matter of law, not a matter of discretion. A court's review of the trial court's dismissal is de novo, and no deference is given to the trial court's determination."*Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555 (Mo. Ct. App., 1999). A determination that respondent was a MAPA agency is clearly a matter of "statutory construction" and thus a "matter of law" subject to a de novo review.

In *Mabin Constr. Co. v. Missouri Highway & Transp. Comm'n*, 974 S.W.2d 561, 563 (Mo. Ct. App., 1998) the Appellate Court established: "Appellate review of a dismissal of a petition for lack of subject matter jurisdiction is for an abuse of discretion. Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and

unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Rulings made within the trial court's discretion are presumed correct and the appellant has the burden of showing that the trial court abused its discretion." The trial court clearly abused its discretion, in not allowing discovery to commence before dismissing this case. Respondent was precluded from providing a factual basis for the trial court dismissal of appellant's claims. Appellant's claims were dismissed due to the trial court's abuse of its discretion and without relying upon a single fact. No facts were submitted on the record by respondent to support the trial court's final order, absent an abuse of discretion. (Appendix p.A1).

The Court of Appeals continued in *Mabin Constr. Co.* Id. "Dismissal for lack of subject matter jurisdiction is proper when it appears by a preponderance of the evidence, that the court is without jurisdiction. In reviewing a trial court's dismissal of a petition, an appellate court must determine if the facts pleaded and the reasonable inferences to be drawn therefrom state any ground for relief." In *Owner Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 133 S.W.3d 162, 166 (Mo. Ct. App., 2004), the Court of Appeals determined: "Whether there is subject matter jurisdiction is a question of fact left to the sound discretion of the trial court. As such, when the trial court answers that question of fact, an appellate court will review for an abuse of discretion."(emphasis added). The trial court had no facts provided by respondent upon which to reach the conclusion that trial proceedings must be dismissed. For example, respondent alleges that the Appeals Board process was very regimented and highly procedural when not a single document confirms that bald assertion of fact. This Court should not over look the fact the Appeals Board was only "advisory" to the "City Manger" about the "City Manager's" actions. The Trial Court's ruling was a clear abuse of discretion and contrary to any reasonable inference which could be drawn from appellant's amended petitions, appellant's unrefuted affidavit, and business records affixed to appellant's responsive memorandums.

APPELLANT'S ALLEGED FAILURE TO STATE A CLAIM

UPON WHICH RELIEF CAN BE GRANTED

As explained by this Court in *Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo., 2001), Nazeri V. Missouri Valley College, 860 S.W. 2d 303, 306 (Mo. banc 1993).* "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." Assuming all of appellant's averments are true would have unquestionably not lead to a dismissal of appellant's case by the trial court.

The Court of Appeals in *Owner Operator Indep. Drivers Ass'n , supra at 165* stated: "Where the trial court has granted a motion to dismiss after determining that there is no private right of action or that the petition fails to state a claim, an appellate court reviews the trial court's ruling by giving the pleading its broadest intendment and treating all facts alleged as true. In addition to assuming all of the averments in the petition are true, all reasonable inferences therefrom are liberally granted to the plaintiff. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Rather, the petition is reviewed in almost an academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in the case. The petition is construed favorably to

the plaintiff in order to determine whether the averments contained therein invoke substantive principles of law which entitle the plaintiff to relief."(emphasis added). The trial court's review of the Third Amended Petition, giving it the broadest intendment, and having all reasonable inferences liberally granted would not result in this case being dismissed by the trial court. The substantive principles of law raised by claims of "whistleblower retaliation", wrongful termination and breach of contract were collectively dismissed only through the trial court's abuse of its discretion and in the face of a litany of facts as solely by the appellant which should have clearly favored this case continuing through discovery to trial. The pleadings cited a substantial factual and legal basis for the petition to survive a motion to dismiss for failure to state of cause of action. The facts and extremely detailed listing of the laws and ordinances which were violated by respondent, as asserted in appellant's petition, could only have yielded a dismissal if there was a blatant abuse of the trial court's discretion.

POINTS RELIED ON

I.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUES RAISED BY RESPONDENT, THROUGH APPLICATION FOR TRANSFER, FOR OTHER LEGAL ISSUES RAISED BY APPELLANT WILL ALSO LEAD TO THE REVERSAL OF THE TRIAL COURT'S RULING, IN THAT RESPONDENT IS NOT A "POLITICAL SUBDIVISION OF THE STATE" THAT IS AFFORDED SOVEREIGN IMMUNITY, AND NO SOVEREIGN IMMUNITY WOULD EXIST TO THE EXTENT

RESPONDENT MAINTAINED LIABILITY INSURANCE

Davis V. City of St. Louis, 612 S.W. 2d 812, 814 (Mo.App. E.D. 1981)

Jungerman V. City of Raytown, 925 S.W. 2d 202, 204 (Mo. banc 1996)

Junior College District of St. Louis V. City of St. Louis, 149 S. W. 3d 442, 447 (Mo banc 2004)

MoRS § 537 et seq.

II.

THE TRIAL COURT IS VIEWED AS ABUSING ITS DISCRETION IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANT'S LAWSUIT, FOR THE TRIAL COURT DID MAINTAIN JURISDICTION OVER TRIAL COURT PROCEEDINGS IN THAT RESPONDENT'S APPEALS BOARD PROCESS WAS NOT A MISSOURI ADMINISTRATIVE PROCEDURE ACT (MAPA) AGENCY, APPELLANT'S CLAIMS WAS NOT A "CONTESTED CASE" UNDER MAPA, AND RESPONDENT'S APPEALS BOARD WAS ONLY "ADVISORY"

Boyle v. *Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo.App.W.D. 1985)

Kirk v. Mercy Hosp. Tri-County, 851 S.W.2d 617 (Mo.App.S.D. 1993)

Kline v. Bd. of Parks & Re. Comm'rs, 73 S.W.3d 63, 66 (Mo. App. 2002)

Reynolds V. City of Independence, 693 S.W. 2d 129, 131 (Mo. App. 1985)

III.

THE TRIAL COURT IS VIEWED AS ABUSING ITS DISCRETION IN SUSTAINING RESPONDENT'S MOTION TO DISMISS ALL OF APPELLANT'S CLAIMS THROUGH RESPONDENT'S ARGUMENT THAT COUNTS II (WRONGFUL TERMINATION) AND III (BREACH OF CONTRACT) WERE "INEXTRICABLY INTERTWINED" WITH COUNT I (WHISTLEBLOWER RETALIATION) AND THE TRIAL COURT JURISDICTION OVER ALLEGEDLY "INTERTWINED" CLAIMS

Adcock V. Newtec, Inc.,939 S.W.2d 426, 428 (Mo.Ct. App. 1997)

*Boyle V. Vista Eyewear, Inc.,*700 S.W. 2d 859, 870-871(Mo.Ct.App.1985)

Dake V. Tuell, 687 S.W. 2d 191,193 (Mo.1985)

Two Pershing Square, L.P. V. Boley, 981 S.W. 2d 635 (Mo. App W.D. 1998)

IV.

THE TRIAL COURT IS VIEWED AS ABUSING ITS DISCRETION IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANT'S LAWSUIT UNDER THE PREMISE APPELLANT HAD NO PRIVATE CAUSE OF ACTION IN COUNT II AS A "WRONGFUL TERMINATION" CLAIM THROUGH THE THIRD AMENDED PETITION

*Boyle V. Vista Eyewear, Inc.,*700 S.W. 2d 859, 870-871(Mo.Ct.App.1985)

Haley v. Fiechter, 953 F. Supp. 1085, 1090 (E.D. Mo. 1997)

J.M.F. V. Emerson, 768 S.W. 2d 579, 582 (Mo. E.D. 1989)

5 U.S.C. § 1201 *et seq.*

ARGUMENT

I.

THE SUPREME COURT NEED NOT ADDRESS THE ISSUES RAISED BY RESPONDENT, THROUGH APPLICATION FOR TRANSFER, FOR OTHER LEGAL ISSUES RAISED BY APPELLANT WILL ALSO LEAD TO THE REVERSAL OF THE TRIAL COURT'S RULING, IN THAT RESPONDENT IS NOT A "POLITICAL SUBDIVISION OF THE STATE" THAT IS AFFORDED SOVEREIGN IMMUNITY, AND NO SOVEREIGN IMMUNITY WOULD EXIST TO THE EXTENT RESPONDENT MAINTAINED LIABILITY INSURANCE

The respondent application for transfer is deemed moot, for the issues they raise regarding sovereign immunity are inapplicable to respondent . Respondent lacks standing to raise the privilege of sovereign immunity, and thus the other issues raised by appellant will still yield a reversal of the trial courts ruling. In turn, other unrefuted assertions by appellant will ultimately lead this Honorable Court to the same conclusions reached by the Court Of Appeals, Eastern District That being, the trial court's ruling was in error and must be reversed.

Respondent, the City of Olivette, is a municipality which improperly attempts to seek refuge from liability under a claim of sovereign immunity. Respondent cited §567.610.1 R.S.Mo. (2004), in their Appellate reply brief, while the correct statute is §537.610.1 R.S.Mo. (2004). Setting aside this typographical error, appellant asserts the following:

RESPONDENT HAS PRESENTED NO EVIDENCE THAT THEY PROCURED LIABILITY INSURANCE TO ADDRESS APPELLANT'S LAWSUIT

Despite respondent's assertion they have liability insurance to address appellant's claims, no such tangible proof has been proffered during the life of litigation in this case. In "Defendant's Motion to Dismiss," on page 12 of respondent's trial court motion states: " Defendant does indeed, maintain liability insurance. See Exhibit C." (Appendix p. A8). In fact, "Exhibit C" that was attached to respondent's trial court Motion to Dismiss was the City of Olivette's Ordinance 20.494, rather than proof of insurance. The failure to present proof of insurance on respondent's part, or any time since the filing of the "Defendant's Motion to Dismiss" during trial court proceedings, cannot be cured at this time for this Court's consideration, for it is not a part of the Record on Appeal. The failure to provide proof of insurance, through an amended "Exhibit C" or otherwise, was an oversight that was raised in appellant's: 1. "Reply Brief" to Defendant's Motion to Dismiss in trial court proceedings; 2. "Sur-Reply to Defendant's Motion to Dismiss" in trial court proceedings; 3. Appellant's Appeal Brief; 4. Appellant's Reply Briefs; and 5. If undersigned counsel's memory does not fail him, the respondent's failure to provide tangible proof of insurance, was also mentioned briefly in oral argument before the Appellate Court.

As this Court determined in *Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass'n*, 805 S.W.2d 173 (Mo. banc 1991); *State ex*

rel. Laszewski v. R.L. Persons Construction, Inc., 136 S.W.3d 863 (Mo. Ct. App. 2004), a party may not present new evidence in support of a defense or legal argument, in this case RSMo. Chapter 537.610, in the aftermath of judicial proceedings. As explained in the proceeding paragraph, the absence of proof of insurance is of no surprise to the respondent. As this Court stated in *Land Clearance*, "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance*, 805 S.W.2d at 176. The respondent had up to five "bites of the apple" to produce tangible proof of liability insurance, and stripped themselves of the right to argue sovereign immunity is their shield to liability against appellant's claims. The respondent's wish to rely on such protection afforded by proof of insurance, which has never been proven and can not now be cured before the Supreme Court. This missing proof of liability insurance by a certificate or otherwise, when left unattended in every other judicial proceeding to date, may not now be remedied for respondent's reliance and this Honorable Court's analysis.

RESPONDENT IS NOT A POLITICAL SUBDIVISION

TO BE AFFORDED SOVEREIGN IMMUNITY

Respondent incorrectly relies upon *Jungerman V. Raytown*, 925 SW 2d 202, 204 (Mo. 1996) in their attempt to apply the doctrine of sovereign immunity. In brief,

Jungerman supports appellant's case on several fronts: (1) *Jungerman* clearly states: "Since 1959, municipalities have been liable: as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried. Mo. Rev. Stat. §§ 71.185." Id. at HN.8; (2) The *Jungerman* ruling was not at the pleading stage, as in the instant case, but rather the post-trial stage through a motion for JNOV; and (3) *Jungerman* notes:

> "The term "sovereign immunity" does not strictly apply to the immunity possessed by municipalities. Under common law, true sovereign immunity applies only to the state and its entities, preempting all tort liability. This full immunity never applied to municipalities. Rather, municipal corporations have a more limited immunity only for governmental functions, those performed for the common good of all."Id. H.N. 3. (emphasis added).

The respondent's acts of retaliating against a whistleblower were not "governmental functions" performed for the common good of all, and thus sovereign immunity does not apply to the respondent.

As stated by the Appellate Court, municipal corporations, such as the City of Olivette, have only limited immunity only for governmental functions; they do not enjoy sovereign immunity in tort while performing proprietary functions. *Junior College District of St. Louis V. City of St. Louis*, 149 S.W. 3d 442, 447 (Mo. banc 2004). Governmental functions also have been described as part of a municipality's delegated police powers, as compared to proprietary actions, which are part of a municipality's private corporate enterprises. *City of Hamilton V. Public Water Supply Dist. No. 2 of Caldwell County*, 849 S.W. 2d 96, 102 (Mo. App. WD 1993). It is further made apparent that a municipality cannot escape responsibility for the careful performance

of a duty which is substantially one of a proprietary nature, such a the termination of appellant, a function that is performed as a private enterprise. The termination of an municipal employee, be it a proper or illegal act, can in no way be interpreted as a governmental function "for the common good of all." *Davis V. City of St. Louis*, 612 S.W. 2d 812, 814 (Mo. App. E.D. 1981).

The respondent, in prior briefs inappropriately cited *State ex. Rel. Ripley County V. Garett,* 18 S.W. 3d 504 (Mo. App 2000) to address the issue of sovereign immunity. The instant case can be distinguished from the facts pattern in *Riley County*, for Riley County was a political subdivision of the State of Missouri, while respondent, City of Olivette, is not a political subdivision that is afforded sovereign immunity. Respondent made the admission respondent purchased insurance coverage to respond to the instant lawsuit and such an admission should recognized by this court (ROA p. 61).

The inapplicability of R.S.Mo. section 537.610.1 (incorrectly cited by respondent as 567.610.1) as referenced by respondent, is addressed in *Ripley County* as follows: "The insurance contract . . . never promised coverage of the kind of claim made by [the suing party]. . . . Because [the] negligence claim does not fall under 'the purposes covered by [the] policy of insurance,' no coverage exists under this policy for the claim and no waiver of sovereign immunity exists under the language of section 537.610.1." In contrast, in the instant case, there is coverage applicable to this lawsuit as admitted in respondent's memorandum of law. (ROA p. 61). Further, the sovereign immunity argument was only available to *Ripley County* for it was a political subdivision of Missouri, unlike respondent. An analysis of the scope of insurance coverage was presented in *Ripley County* premised upon the County's political subdivision status. Respondent's unexplained failure to provide the trial court

proof of such coverage can not be remedied before this Court.

Respondent's lack of sovereign immunity protection as also established by this Court in *Jungerman V. Raytown*, 925 S.W. 2d 202, 204 (Mo. 1996). Most importantly, *Jungerman* notes: "Under common law, true sovereign immunity applies only to the state and its entities, preempting all tort liability. This full immunity never applied to municipalities. Rather, municipal corporations have a more limited immunity only for governmental functions, those performed for the common good of all. *Johnson v. Bi-State Development Agency*, 793 S.W.2d 864, 866 (Mo. banc 1990).

Municipalities have no immunity for torts while performing "proprietary functions", i.e. those performed for the special benefit or profit of the municipality acting as a corporate entity." Id.; cf. *Wollard v. Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). Under this premise, respondent while performing the "proprietary function" of managing municipal operations and managing its personnel, including the appellant, is was not afforded sovereign immunity protection.

Further as argued supra, respondent is not the "state and its entities". *Jungerman* continues at p.205:

"Under the discretionary immunity doctrine, a city is not liable for the manner in which it performs discretionary duties. (citations omitted). Missouri cases on municipal liability do not define discretionary acts other than with words like "judicial" or "legislative." (citations omitted; emphasis added).

The Court in *Jungerman* clearly support appellant and dispel respondent's claim of sovereign immunity for respondent was not performing "judicial or legislative" acts when they retaliated against a whistleblower and wrongfully terminated appellant. Therefore sovereign immunity is not a shield to respondent's liability for their acts from which the instant cause of action arose. *Green V. Lebanon R.III Sch. Dist.*, 13 SW 3d

278, 284 (Mo. 2000).

In summary, respondent attempts to seek shelter from liability via sovereign immunity that is clearly protection not afforded respondent, a non-political subdivision of Missouri. The above cited cases make it clear that respondent cannot avail themselves of the privilege of sovereign immunity when they perform proprietary functions such a terminating a whistleblower, rather than performing governmental function for the good of all.

FEDERAL COURT'S INTERPRETATION OF THE ISSUE OF SOVEREIGN IMMUNITY AND ITS INAPPLICABILITY TO MUNICIPALITIES, ALTHOUGH CLEARLY NOT BINDING UPON THIS COURT, THAT INTERPRETATION DOES PROVIDE SOUND REASONING AND INSIGHTFUL ANALYSIS.

Respondent, in their Application for Transfer, request a reexamination of Missouri case law, relying upon cases applicable to political subdivision of the State of Missouri. Respondent is no such political subdivision. Political subdivision, not municipalities such as the respondent in the instant case, enjoy a slice of state powers. If this Court opts to overlook respondent's failure to provide proof that it maintains liability insurance, (supra) and does seeks guidance in assessing the doctrine of sovereign immunity, then the appellant offers federal case law analysis as a source of sound legal reasoning and insightful analysis, without binding effect.

The U.S. Supreme Court's analysis in *Hess*, *Lake Country Estates*, *Madison*, *Printz* and their progeny provide an invaluable perspective on the doctrine of sovereign

immunity from a federal perspective.

The U.S. Supreme Court in *Hess V. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 34, 115 S.Ct 394, 402(1994) (citing footnote in *Lake Country Estates, Inc. V. Tahoe Regional Planning Agency*, 440 U.S. 391, (1979) 400-401) stated:

> "It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would had essentially the same practical consequences as a judgment against the State itself. **But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."** (emphasis added)

Respondent in the instant case is not the appropriate "political subdivision" to be afforded sovereign immunity.

In the concurring opinion of Justice Stevens in *Hess* Id at 407, it is made clear how narrowly sovereign immunity, albeit Eleventh Amendment protection, should be applied:

> "This Court's expansive Eleventh Amendment jurisprudence is not merely misguided as a matter of constitutional law; it is also an engine of injustice. The doctrine of sovereign immunity has long been the subject of scholarly criticism. n1 And rightly so, for throughout the doctrine's

history, it has clashed with the just principal that there should be a remedy for every wrong. See, e.g. *Marbury V. Madison* ,5 U.S. 137, 1 Cranch 137, 163, 2 L. Ed. 60 (1803). **Sovereign immunity inevitably places lesser value on administering justice to the individual than on giving government a license to act arbitrary**....

Arising as it did from the peculiarities of political life in feudal England (citation omitted) **sovereign immunity is a doctrine better suited to a divinely ordained monarchy than our democracy**.n2 Chief Justice John Jay recognized as much over two centuries ago. See *Chrisholm V. Georgia*, 2 U.S. 419, 2 Dall. 419, 417-472, 1 L.Ed. 440 (1793).”(emphasis added).

In *Printz V. United States*, 521 U.S. 898, 957 (1997), the dissenting opinion of Justices Stevens, Souter and Breyer, echoed the same sentiment:

"But despite the fact that "political subdivisions exist solely at the whim and behest of their State, (citation omitted) we have "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities" (citations omitted; emphasis added).

The above cited Federal cases shed light on the fact that respondent should not avail themselves of the privilege of sovereign immunity when they perform proprietary functions such a terminating a whistleblower, rather than performing governmental function for the “good of all”.

SOVEREIGN IMMUNITY UNDER RSMO § 537.600 RELATES SOLELY TO TORT IMMUNITY AS RECOGNIZED AT COMMON LAW PRIOR TO SEPTEMBER 12, 1977 AND NOT APPELLANT'S BREACH OF CONTRACT CLAIM

The appellant, as the plaintiff in *Gavan v. Madison Memorial Hospital*, 700 S.W.2d 124, 126-127 (Mo. Ct. App., 1985), brought a tort and breach of contract claim. In *Gavan*, as in the instant case, the breach of contract claim arose from the employer's policy manual. The Court in *Gavan* at p. 126-7 noted:

> "The doctrine of sovereign immunity and the related doctrine of official immunity have no application to suits for breach of contract. Section 537.600 RSMo 1978 expressly relates only to tort immunity as recognized at common law prior to September 12, 1977, ... it follows that the trial court erred in sustaining summary judgment on Counts I and II of plaintiff's petition claiming breach of contract. The facts indicate that during her employment with the Hospital plaintiff was presented with the Personnel and Procedures Manual together with a statement that her employment would be governed by the policies stated in the manual. In Arie v. Intertherm, 648 S.W.2d 142, 143, 153 (Mo. App. 1983) this court held such document created contractual rights in the employee without evidence of mutual agreement to this effect and despite the fact that the terms could be unilaterally amended by the employer without notice."... The Supreme Court in V. S. Dicarlo Construction Co., Inc. v. State, 485 S.W.2d 52, 56 (Mo. 1972), appeal after remand, 567 S.W.2d 394 (Mo. App. 1978) held that <u>when the state enters into a validly authorized contract, it lays aside whatever privilege of</u>

sovereign immunity it otherwise possesses and binds itself to performance just as any private citizen."(emphasis added).

As with the plaintiff in *Gavan*, the appellant in the instant action has a contract claim arising from "personnel and procedures manuals" relating exclusively to his employee benefits. The respondent's municipal ordinances, as averred at length in appellant's amended petitions, should have made certain retirement benefits, sick leave, etc. available to all municipal employees. In turn, respondent "lays aside whatever privilege of sovereign immunity it otherwise possesses."

RESPONDENT WAIVED THEIR PRIVILEGE TO SOVEREIGN IMMUNITY, IF ANY, TO THE EXTENT THE RESPONDENT PURCHASED LIABILITY INSURANCE

Appellant averred in paragraph 30 of his petition (ROA p.39) that respondent carries liability insurance that encompasses the instant lawsuit, as addressed in *Martin V. Washington*, 1992 Mo. App. Lexis 573 (Mo.Ct. App. Mar. 31 1992) and *Counts v. Morrison-Knudsen, Inc.*, 663 S.W. 2d 357 (Mo. Ct. App. 1983). Respondent made the admission they maintain liability insurance to address appellant's lawsuit in their Motion to Dismiss and Reply memorandums (ROA pp. 61, 143) and inappropriately on page 41 of the Brief of Respondent, without a single document in the Record on Appeal (setting the erroneously marked "Exhibit C", Appendix p.A8; ROA p. 63) to support the assertion insurance coverage exists to address appellant's claims. What is relevant is that the coverage provided by respondent's insurer (presumably MOPERM)

encompasses the scope of the instant lawsuit.

Contrary to the argument of respondent, a governmental entity enjoys immunity if it does not carry liability insurance or adopt a plan of self-insurance. *Anderson V. State*, 709 S.W. 2d 893, 896 (Mo. Ct. App. 1986). The alleged third party agreement between the respondent and their insured to preserve sovereign immunity, as argued by respondent is without effect absent proof through tangible documentary proof of insurance. Further, a third party agreement would not have effect as it related to appellant and is not made an exception to the findings in *Anderson*, Id.

Due to the coverage maintained by respondent, through their own admission (ROA pp. 61, 143) respondent has no right to the privilege of sovereign immunity. The trial court manifestly abused its discretion in dismissing appellant's claims, and the trial court's decision to sustain respondent's motion for dismissal must be reversed.

II.

THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANT'S CLAIMS FOR THE TRIAL COURT DID MAINTAIN JURISDICTION OVER TRIAL COURT PROCEEDINGS IN THAT THE TRIAL COURT ERRED FOR RESPONDENT'S APPEALS BOARD PROCESS FAILS AS A MISSOURI ADMINISTRATIVE PROCEDURE ACT (MAPA) AGENCY, APPELLANT'S CLAIMS DID NOT QUALIFY AS A "CONTESTED CASE" UNDER MAPA, AND RESPONDENT'S ALLEGED "ADMINISTRATIVE REMEDY" WAS VOID TO ABORT THE APPEALS BOARD PROCESS

The trial court abused its discretion in granting respondent's motion to dismiss appellant's claims that he was retaliated against, in violation of public policy, for refusing to perform illegal and unsafe acts, and was thus wrongfully terminated.

APPELLANT WAS AN AT-WILL EMPLOYEE

The general rule in Missouri is that an employee who does not have a contract containing a statement of duration is an at-will employee, and may be discharged at any time, with or without cause, and the employer will not be liable for wrongful discharge. *Leuthans v. Washington Univ.*, 894 S.W.2d 169, 172 (Mo. 1995); *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 343 (Mo.App.E.D. 1995). Beginning in 1985, however, Missouri courts began to recognize an exception to this general rule based upon public policy considerations. In *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo.App.W.D. 1985), the first case to recognize such an exception, the Western District Court of Appeals held that "where an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for wrongful discharge." Id. at 878.

Soon thereafter, the Eastern and Southern Districts of the Court of Appeals concurred with the holding in *Boyle*. *See Beasley v. Affiliated Hosp. Products*, 713 S.W.2d 557 (Mo.App.E.D. 1986); *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo.App.S.D.

1993). Thus appellant, an at-will employee, can maintain a cause of action for wrongful termination as a whistleblower.

APPELLANT'S EXERCISE OF PRE-TERMINATION FREE SPEECH RELATING TO PROTECTED ACTIVITY RESULTED IN HIS TERMINATION

In the present case, appellant exercised his right to free speech and voiced his complaints against respondent's wrongful actions **before** appellant's termination, unlike the plaintiff in *Porter* who had his case dismissed for post-employment complaints being made. *Porter v. Reardon Machine Company,* 962 S.W. 2d 932, 938-939 (Mo. App. 1998). Appellant further alleges, *inter alia,* that respondent terminated his employment on August 15, 2003, because appellant refused to violate the law and allow respondent to place the general public and respondent's employees in harm's way. To establish a submissible case, appellant must demonstrate that "conduct required of him by the employer would have amounted to a violation of a statute, constitutional provision or regulation adopted pursuant to a statute, and also that his discharge was attributable to a refusal to perform the unlawful act or his performance of a mandated lawful act contrary to the directions of his employer." *Crockett v. Mid-America Health Services,* 780 S.W.2d 656, 658 (Mo.App.W.D. 1989).

Thus appellant exercised free speech to complain of whistleblower retaliation, long before the date of his wrongful termination and to uphold appellant's refusal to violate the law and contravene strong public policy interests.

APPELLANT'S EXERCISE OF FREE SPEECH CLEARLY RELATED TO WHISTLEBLOWER ACTIVITY SURROUNDING THREE ISSUES

Appellant relies upon several sources of public policy to support his claim that he refused to violate the law or a clear mandate of public policy, and was retaliated against for his opposition to respondent's violation of the law: 1. **Disability Non-Compliance**- The first whistleblower issue, in which appellant exercised his right to free speech and continually complained to respondent, was the inaccessibility of several of respondent's buildings (public works buildings and city hall) for the disabled, and inadequate signage and parking spaces for "disabled" designated vehicles. This whistleblower issue was in clear violation of RSMo § 209.160[1], RSMo § 67.280, Chapter 40.010 of the respondent's municipal code which adopts the Building Officials and Code Administrators (BOCA) Chapter 11 , entitled "Accessibility," Chapter 270.310 of the respondent's municipal code, and although not directly cited by petition amendment, the federal laws mandating public accommodation accessibility through the Americans with Disabilities Act (ADA) 42 U.S.C.§§ 12101 et seq.(ROA p. 34) ; 2. **Dangerous Dielman Culvert** -The second issue in which appellant exercised his right of free speech and continually complained to respondent related to the dangerous structural disrepair of the Dielman culvert for which respondent refused to allocate funding to repair this hazard to the general public. This whistleblower issue was in clear violation of respondents duty to maintain roadways in a safe condition within respondent's city limits, as regulated by respondent's: Ordinance 394,

[1]RSMo § 536.031 states that "[t]he courts of this state shall take judicial notice, without proof, of the contents of the code of state regulations." RSMo § 536.031.5.

Municipal Code Chapter 20.250, and 20.255, sub-items 1, 2, 3, 7, and 11 and general public policy interests in having structurally sound roadways. (ROA pp. 34, 35); 3.**Significant Disrepair of Respondent's Backhoe**- The third issue in which appellant exercised his right to free speech and continually complained to respondent related to the significant disrepair of a dangerous backhoe owned and operated by respondent. The backhoe's unsafe condition violated the City of Olivette's Safety Manual, page 16, #16, and respondent's Safety Program to ensure the protection of city personnel, and OSHA regulations associated with commercial equipment use. (ROA p. 35).

These three whistleblower issues were presented to the trial court during a motion to dismiss hearing and in written memorandum. The trial court's decision to sustain respondent's motion to dismiss appellant's claims for refusing to violate the law was based upon unestablished factual or legal principals. As set forth below, the trial court's decision was erroneous and its judgment should be reversed.

In sustaining respondent's motion to dismiss, the trial court abused its discretion in determining that the trial court lacked jurisdiction over appellant's claims or that the original petition and three subsequent amendments to the original petition were insufficient to overcome respondent's motion to dismiss. Consequently, according to the trial court, none of the activities that appellant refused to perform arguably violated the above cited local ordinances, city charter, handbooks, state law, and federal laws. Appellant submits that the trial court interpreted the public policy exception to at-will employment much too narrowly and ignored the fundamental purpose of the exception to at-will employment, which is to

protect the public from harm. Appellant's actions in refusing to perform unsafe and unlawful activity in violation of federal, state and municipal laws was protected activity which was for the good of the public.

Thus the trial court's abuse of discretion should be reversed and this case should be remanded for further trial court proceedings.

TO ACQUIRE WHISTLEBLOWER PROTECTION, APPELLANT NEED NOT REPORT ACTIVITY WHICH WAS ACTUALLY ILLEGAL

While this Court has never directly addressed this issue, courts from other jurisdictions have held that employees may bring wrongful discharge actions against their employers even where the activities that they refused to perform were not actually illegal. For example, in *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987), the Supreme Court of Minnesota held that "an employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law." 408 N.W.2d at 571. Similarly, in *Allum v. Valley Bank of Nevada*, 970 P.2d 1062 (Nev. 1998), the Supreme Court of Nevada found that a "claim for tortious discharge should also be available to an employee who was terminated for refusing to engage in conduct that he, in good faith, believed to be illegal." 970 P.2d at 1068. As the court noted, "'[a]ny other conclusion . . . would encourage unlawful conduct by employers and force employees to either consent and participate in violation of the law or risk termination.'" *Id.* (quoting *Vermillion v. AAA Pro Moving & Storage*, 704 P.2d 1360, 1362

(Ariz. 1985)).

During trial court proceedings and argument in the motion to dismiss hearing held on July 16, 2004, appellant referred the trial court to the above referenced violations of federal, state and local laws, regulations, ordinances, and public policy interests associated with appellant's whistleblower activity to support his claims.

In *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo.App.S.D. 1993), the Southern District addressed a similar issue involving state statutes and regulations applicable to the practice of nursing. In that case, the plaintiff, a registered nurse, alleged that she was wrongfully discharged in violation of public policy for refusing to stay out of a dying patient's improper treatment, which she claimed would have violated a clear mandate of public policy as expressed in the Nursing Practice Act, RSMo. § 335.011 *et seq*., and the accompanying regulations. *Kirk* 851 S.W.2d at 620-22. The Southern District agreed with the plaintiff that the Nursing Practice Act and regulations thereunder "constitutes a clear mandate of law on which a cause of action for wrongful discharge in violation of public policy can be based." *Id*. at 622. The respondent's safety manuals and ordinances in the instant case should not be treated any differently and should be a basis for supporting appellant's complaints that respondent violated its own employee handbook, respondent's safety manuals, state and federal laws.

As the foregoing discussion demonstrates, appellant presented sufficient evidence during trial court proceedings to establish a submissible case on appellant's claim that he was wrongfully retaliated against and terminated in violation of public policy for refusing to

violate the law and clear mandate of public policy.

THE RESPONDENT'S FAILED APPEAL BOARD PROCESS COULD NOT BE UTILIZED BY APPELLANT TO ADDRESS HIS GLOBAL COMPLAINTS WHICH EXTENDED BEYOND THE INTERIM "CITY MANGER'S" ACTIONS

Respondent argues that appellant should have his case dismissed, in that appellant allegedly did not exhaust his administrative remedies before the Appeals Board. Yet the very ordinances upon which respondent relies and hails as the "end all" administrative remedy were summarily amended by respondent, within two weeks of appellant's filing of his reply memorandum (ROA pp. 169-172, Appendix p. A2-A3). The very ordinances respondent claims should have been exhausted by appellant, were amended months after appellant's termination and the availability of such "new and improved" administrative remedies. This speaks volumes as to the original ordinances' misapplication, ambiguities, and ineffectiveness. The following Appeals Board process concerns, amongst others, were raised in the trial court and appellate proceedings:

1. Respondent's Flawed Appeals Board Process Is Revamped While Appellant and Respondent Exchanged Memorandum Relating to Motion To Dismiss- The Appeals Board process, that respondent portrays as appellants's sole means of redress, itself was revamped within weeks (June 8, 2004) of appellant's memorandum in rebuttal to respondent's Motion to Dismiss. Respondent's actions confirmed the Appeal Board process had ambiguities and was void. The

June 8, 2004, ordinance changes highlighted the shortfalls experienced by appellant, as noted in appellant's rebuttal memorandum in trial proceedings. Respondent in turn amended the Appeals Board ordinances, sections 20.494 and 20.511. (Appendix p. A2, A3). The Appeals Board's role was changed from "advisory" to rendering "final determinations." This was a significant shortfall in the Appeals Board process which faced appellant at the time of his wrongful termination. (compare ROA pages 169 versus 170; similarly compare ROA pages 171 versus 172; Appendix p. A2, A3);[2]

2. The Appeals Board Only Provided "Recommendation" to the City Manager About The City Manager's Actions Not Final Determinations -The Appeals Board's "recommendation" could have been accepted or rejected by a part-time "Interim City Manager." This issue was addressed in part by respondent's amended Appeals Board ordinance. (ROA pp. 169-172; Appendix p. A2, A3);

3. Appellant's Use of the Appeals Board Process Was An Optional Mode of Conflict Resolution Through Respondent's Use of The Word "May"-- Appellant did on numerous occasions provide notice of his complaints about his whistleblower retaliation and object to

[2] Appendix p. A2-A3 was an 11"X 17" exhibit presented by appellant in oral argument in open court before the trial court on July 16, 2004, relating to respondent's Motion to Dismiss.

his forced retirement /termination. Not once did respondent inform appellant the Appeals Board was the sole means of resolving appellant's claims. The use of the word "may" in respondent's procedures relating to an employee's complaints and the optional use of the Appeals Board means such a course of action is purely an option, not a mandate. The Employee Handbook under the heading "Complaints" on page 10 (ROA p.174) through use of the terms "may arrange to have your problem reviewed by the Olivette City Personnel Board of Appeals" portrays the Appeals Board as a discretionary means of complaint resolution;

4. The Respondent's Appeals Board Process Addressed Solely the Actions of the "City Manager"- The Appeals Board was empaneled to address issues relating exclusively to the City Manager's actions against an employee relating to "discharge, suspension disciplining..." not respondent's City Council members unlawful acts of whistleblower retaliation and wrongful termination. The narrow focus of the Appeals Board authority provided no remedy at all, and surely should not have stripped the trial court of jurisdiction in this matter;

5. The Appeals Board Process Did Not Apply to An Interim City Manager As Was the Case- Respondent's Interim City Manager, Kent Leichliter, worked only on a part-time basis, contrary to respondent's Charter requirements. (ROA p. 96 ¶ 13 C; ROA pp. 99-101). An "Interim City Manager" was not a recognized City function by respondent's charter or ordinances and thus the Appeals Board was inapplicable to appellant's complaint against the interim City Manager and

respondent's council members unlawful actions against the appellant, a whistleblower. The Interim City Manager was the source of substantial retaliation and the eventual termination of appellant; and

6. The Appeals Board Lacked A Tie Breaker Vote- The Appeals Board was missing one "tie breaking"voting member on the Appeals Board, which was comprised of only four (4) members instead of the five (5) members as mandated by respondent's ordinances.(ROA p. 94; ROA p. 96 ¶ 13 F). Appellant was aware of this and other flaws and could not have exercised the Appeals Board because of these flaws in the Appeals Board process.

The "reasonable notice"aspect of the due process requirements as cited by respondent, in *Rose V. State Bd. of Registration for the Healing Arts*, 397 S.W.2d 570, 574 (Mo. 1965), have not been met by the above enumerated deficiencies in the Appeals Board process . The Appeals Board could not address any of appellant's claims nor was the Appeals Board specified as a condition precedent to filing a lawsuit against respondent. In particular, the Appeals Board was never charged with the ability to address acts of retaliation by the respondent's City Council members and City Administrators, but for the sake of argument, solely the actions of the "City Manager."

RESPONDENT WAS NOT A MAPA STATE AGENCY

The respondent incorrectly argues that they operate under the Missouri Administrative Procedure Act (MAPA) as a state agency. The cases cited by respondent in their rebuttal memorandum to their trail court Motion to Dismiss (ROA p.

141) refers to well recognized state agencies. However, neither respondent, nor their Appeals Board, fall under the MAPA umbrella. Respondent cites *Reynolds V. City of Independence*, 693 S.W. 2d 129, 131 (Mo. App. 1985) for the proposition that respondent, and it's Appeals Board, are a MAPA "agency." Yet as stated in *Reynolds*, which is in direct conflict with respondent's assertion:

"The organic law as to judicial review of actions of administrative agencies is contained in Const. Mo. Art. V, §§ 18 (as amended, 1976). That constitutional enactment provides that all findings, decisions, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law. Chapter 536, RSMo 1978, provides the procedure for review. RSMo § 536.010(1) defines an "agency" as meaning any administrative officer or body existing under the constitution or by law and authorized by law to make rules or to adjudicate contested cases; and (2) a "contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Id. at 131.(emphasis added; this passage of *Reynolds* was not cited in respondent's reply memorandum).

Respondent and its Appeals Board clearly did not meet the requirements of an

"agency"[3] (§536.010 (1)) as defined by MAPA for several reason: (1) Respondent has not provided one citation confirming the Appeals Board , as it existed at the time of appellant's termination was an administrative body "existing under the constitution or by law"; (2) The Appeals Board was not "authorized by law or the constitution to make rules; and (3) The Appeals Board could not "adjudicate contested cases" for at the time of appellant's termination, the Appeals Board provided only a "recommendation" /"advisory" opinions not a final adjudicated determination, to the "City Manager" relating to the "City Manager's" actions, not respondent's whistleblower retaliation

[3] Appellant offered the trial court the following list of recognized "agencies" as defined by R.S.Mo.§ 536.010, in contrast with the Respondent status as a municipality: Missouri Department of Correction; Missouri Department of Insurance; Missouri Department of Revenue; Missouri Clean Water Act Commission; Missouri Department of Child Support; Missouri Department of Natural Resources; Missouri Secretary of State; Missouri Motor Vehicle Commission; Missouri Department of Social Services; Missouri Board of Adjusters; Missouri Commission of Human Rights; Missouri Board of Adjusters; Missouri Board of Police Commissioners; Missouri Board of Directors, School District of Kansas City; Missouri State Board of Education; Missouri Department of Public Health and Welfare; etc. It is obvious from this list of recognized state agencies, respondent's Appeals Board did not meet the definition of a state "agency."

against appellant. For the above stated reasons MAPA is inapplicable to respondent.[4]

RESPONDENT AMENDED THEIR FLAWED ORDINANCES RELATING TO THE APPEAL BOARD PROCESS AFTER APPELLANT'S TERMINATION

Appellant's counsel, would be stunned to find that respondent's counsel was unaware of the June 8, 2004, amendment to the Appeals Board process. A MAPA procedural bar would be totally inapplicable to the pre-amendment Appeals Board process which arguably through ordinance amendment provided the Appeals Board the power to "adjudicate contested cases" 10 months after appellant's wrongful termination on August 15, 2003.

Clearly, neither respondent nor its Appeals Board are a "judicial or quasi judicial" body. The Appeals Board had, before the June 8, 2004, ordinance amendments, performed solely an "advisory" function, which was neither "judicial" or

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[4]As noted supra, the "recommendation"only and "advisory" status of the Appeals Board was amended after appellant's termination. On June 8, 2004, (within weeks of appellant's reply memorandum) respondent enacted ordinance amendments to convert the Appeals Board from an "advisory board" to providing respondent "final determinations"(ROA pp. 169-172; Appendix p. A2, A3).

"adjudicating". The Appeals Board was comprised of citizens, not publically appointed, or statutorily authorized administrators. There were **no written guidelines** in place, at the time of appellant's termination, to outline the procedures that would have been followed during an Appeals Board hearing. The Appeals Board members were not certified or bonded to perform their Appeals Board responsibilities. The Appeals Board conducted an informal assessment and provided solely a "recommendation" to the "City Manager," without binding authority. These fluid "procedures" did not meet the definition of an "agency" pursuant to § 536.010 R.S.Mo. No oath could be taken to attest to the accuracy of proceedings, nor would a certified record of proceedings be generated, upon which to base an appeal of the Appeals Board "recommendation". Nor could witnesses be compelled to attend by subpoena. The criteria for a recognized "contested case" and authorized "record proceeding"were outlined in *Kline v. Bd. of Parks & Re. Comm'rs*, 73 S.W.3d 63, 66 (Mo. App. 2002) and not even remotely close to the Appeals Board process upon appellant's termination. As such, MAPA is inapplicable to the limited powers of the Appeals Board relating to the appellant at the time of the appellant's whistleblower retaliation and wrongful termination.

Respondent can not cloak themselves with "judicial or quasi-judicial" authority to fall under the auspices of a MAPA agency. These powers are created by law and the Missouri constitution. *Reynolds* Id.; *Begshaw V. City of Independence*, 41 SW3d 500, 503 (Mo. Ct. App. 2000).

In *Council Hill Redevelopment Corporation V. Hill*, 920 S.W.2d 890, 893 (Mo. 1996) a redevelopment corporation was attacking the authority of the St. Louis Board of Equalization, a well recognized administrative agency. This Court concluded in *Hill* a recognized administrative agency, unlike respondent was subject to judicial review despite this agencies recognized administrative authority:

"Because the question of exemption poses no factual questions or issues

requiring [the] special expertise...**only questions of law clearly within the realm of the courts, the doctrine of exhaustion does not apply in the present case**. See 73 C.J.S. Public Administrative Law and Procedure §§ 40 ("A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion, which is in its nature peculiarly administrative . . ."). Id. (emphasis added).

Appellant's claims had significant public policy implications and exceeded the limited authority, if any, of the Appeals Board to assess the actions of a "City Manager," not the actions of respondent's administrators, and City Council members. Further, as with *Hill,* the issues raised by appellant were **"**only questions of law clearly within the realm of the courts, the doctrine of exhaustion does not apply in the present case.**"** *Premium Std. Farms V. Lincoln Twp.,* 946 S.W. 2d 234, 237 (Mo. 1997).

Respondent previously cited *Hunter v. Madden*, 565 S.W.2d 456, 458-459 (Mo. Ct. App., 1978) for the proposition that MAPA applies to municipalities. This citation is misplaced. First, respondent's Appeals Board was not a MAPA "agency;" secondly, appellant's whistleblower retaliation and wrongful termination claims were not a "contested case" as defined by MAPA.

The *Hunter* court stated: "Chapter 536, R.S.Mo. 1959 relates to rules of administrative agencies (§§ 536.010 through §§ 536.050), procedures by and before agencies (§§ 536.060 through §§ 536.095) and judicial review of administrative

decisions (§§ 536.100 through §§ 536.150)." The operative words are "administrative agencies." The Appeals Board was not an administrative agency. Even if this Court determined the Appeals Board was an administrative agency, the next threshold question must be overcome- were appellant's claims "contested cases"?

Hunter Id., citing *State ex. Rel Leggett V. Jensen,* 318 S.W. 2d 353, 356 (Mo. banc 1958), defined the term "contested case." The *Hunter* court, in quoting the court in *Jensen* noted:

> "In other words, 'contested case' within the meaning of the Act does not mean every case in which there may be a contest about 'rights, duties or privileges' but instead one in which a contest is required by law to be decided in a hearing before an administrative agency."...This case is not a "contested case" under the law. No statute or ordinance was cited to the trial court mandating a hearing must held before judicial intervention could be exercised by appellant. To the contrary, Section 24 of Ordinance 66-1 states that the Board of Trustees **may** hold hearings. There is no reason to ascribe other than a discretionary meaning to the word "may". If the board has discretion, obviously there is no requirement that a hearing be held". (Emphasis added).

In the instant case, the word "may" was specified in the handbook in reference to appellant's use of the "non judicial" Appeals Board. The discretionary use of the Appeals Board negated any semblance of MAPA "administrative agency" status, let alone an appealable hearing process as required by MAPA. Further, with the Appeals Board lacked judicial status, and appellant's claims could not mature into a "contested case" as required under MAPA.

In *Weber v. Firemen's Retirement Sys*., 872 S.W.2d 477, 479 (Mo., 1994),

this Court referenced their decision in *Byrd v. Board of Curators of Lincoln University*, 863 S.W.2d 873, 875 (Mo. banc 1993), with both establishing that "contested case requirements apply not just to state agencies, but also to any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or adjudicate contested cases. See §§§§ 536.010(1); 536.010(2); and 536.010(5)." (Emphasis added). The Appeals Board under its limited, discretionary authority, before or after the June 8, 2004, ordinance amendments, could not qualify as an "administrative body" nor were appellant's claims a "contested case" as defined by MAPA. See *Hunter* supra at 458. In summary, the Appeals Board was not an administrative agency, and the significant violations of law by respondent, as submitted by appellant, should not have yielded a dismissal of trial court proceedings without a shred of discovery conducted and no independent facts provided by respondent other than respondent's counsel's argument. The Appeals Board was not established by the Missouri Constitution or by statute to "make rules or adjudicate" and the appellant's claims were not a "contested case"as defined by MAPA. Therefore, the appellant was not required to use the Appeals Board and the trial court had jurisdiction over appellant's claims and abused its discretion by wrongfully sustaining respondent's motion to dismiss appellant's claims.

III.

THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN SUSTAINING RESPONDENT'S MOTION TO DISMISS ALL OF APPELLANT'S CLAIMS

THROUGH RESPONDENT'S ARGUMENT THAT COUNTS II (WRONGFUL TERMINATION) AND III (BREACH OF CONTRACT) WERE "INEXTRICABLY INTERTWINED" WITH COUNT I (WHISTLEBLOWER RETALIATION) AND THE TRIAL COURT ALLEGEDLY LACKED SUBJECT MATTER JURISDICTION OVER ALL "INTERTWINED" CLAIMS

The only basis for Count I-III of the Third Amended Petition being dismissed by the trial court was presumptively the trial court's determination that they did not have subject matter jurisdiction or appellant failed to state a claim upon which relief could be granted, with both arguments having been fully addressed in Sections II. supra. As a result, that flawed argument will not be further addressed in this section. The unsupported theory of multiple counts being "inextricably intertwined" and thereby dismissed is without support in law or fact. Appellant is unaware of an "inextricably intertwined"doctrine that could lead to the proper dismissal of appellant's claims.

RESPONDENT CANNOT MERGE ALL OF APPELLANT'S CLAIMS UNDER MAPA'S DEFINITION OF CONTESTED CASES

Respondent incorrectly argues that appellant's claims are inextricably intertwined "contested cases" as defined by MAPA. Respondent's absolute lack of MAPA status is fully addressed in Section II supra. Furthermore, the Third Amended Petition clarified that Count II, "Wrongful Termination,"is distinct from a claim of "Retaliation" (Count I) with a unique set of elements which must be proven by appellant under the applicable jury instructions for each count. Not all retaliation claims

encompass a termination as in the instant case. Conversely, not all "Wrongful Termination" claims include "Retaliation." Lastly, a "Contract Breach" claim is very distinct from appellant's tort claims which are supported by strong public policy interests against wrongful termination. *Boyle V. Vista Eyewear, Inc.,*700 S.W. 2d 859, 870-871(Mo.Ct.App.1985); *Dake V. Tuell*, 687 S.W. 2d 191,193 (Mo.1985); *Adcock V. Newtec, Inc*.,939 S.W.2d 426, 428 (Mo.Ct. App. 1997); Harry Wellford, Jr. and Kimberly Yates, "*The New "Untouchables?"Whistleblowing Employees and Their Protection Under State and Federal Law*",St. Louis Bar Jour., Spring 2004, page 18-22.

RESPONDENT LACKED A LEGAL BASIS TO MERGE

UNRELATED CLAIMS TO GAIN A DISMISSAL

Respondent cloaked their Appeals Board with "administrative agencies" powers which was significantly undermined by appellant's argument in Section I supra. The only case cited by respondent in support of Count I through III being "inextricably intertwined," thereby leading to all counts being dismissed, was *Two Pershing Square, L.P. V. Boley*, 981 S.W. 2d 635 (Mo. App W.D. 1998). This case provides no guidance as to how any counts were supposedly "inextricably intertwined" in the instant case. Nor was this issue addressed in respondent's reply to appellant's sur-reply memorandum before the trial court. Distinct claims, not falling under the auspices of MAPA, must not be improperly linked to each other in an attempt to gain

an improper dismissal. The Appeals Board was never charged to address appellant's "Whistleblower Retaliation," "Wrongful Termination," nor "Breach of Contract" claims pertaining to the actions of the respondent's City Counsel and other high ranking City administrators. Appellant also alleges that he was wrongfully terminated in violation of public policy for reporting respondent's conduct that he reasonably believed violated municipal, state, and federal law. In particular, appellant claims that respondent terminated his employment after he repeatedly complained to respondent as to their failure to accommodate for the disabled or make unsafe conditions safe, a clear violation of the law. The trial court exercised an abuse of discretion in sustaining respondent's motion to dismiss.

In *Sisk v. Union Pac. R.R. Co.*, 138 S.W.3d 799, 804 (Mo. Ct. App., 2004) the Court noted claims with a different factual basis are not so inextricably intertwined that they cannot be separated. As with *Sisk*, the factual questions presented by appellant in a retaliation claim is clearly distinct from a wrongful termination claim or breach of contract claim to undermine these claims being connected or linked together by respondent for dismissal of appellant's lawsuit. This Court in *Sisk* at 804 stated: " … the factual issues underlying the adjudicated claims are separate and not extricably intertwined with the remaining claims" based upon the varied nature of the claims, as with the instant case.

RESPONDENT INCORRECTLY ARGUES THAT BECAUSE APPELLANT WAS EMPLOYED BY RESPONDENT AS THE DIRECTOR OF PUBLIC WORK AND POTENTIALLY WAS VICARIOUSLY PART OF RESPONDENT'S ACTIONS HE HAS NO WHISTLEBLOWER PROTECTION

The law is clear on the issue of whether appellant would have retained whistleblower protection if he would have allowed respondent to break the law. To the contrary, appellant would not have been protected for blowing the whistle on respondent if he had participated in respondent's illegal activities. *See Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999) (holding that public policy rationale does not protect employee who "commits a series of crimes and only points the finger at his employer *after* he has been fired"). By refusing to participate in respondent's illegal activities and making complaints to his superiors about the whistleblower issues before his termination, appellant helped protect the public from harm and should be protected from being wrongfully terminated by respondent. Respondent makes an unsubstantiated claim, without supporting case law, that because appellant was charged with curing the violation of the law he observed he was stripped of his whistleblower protection. This argument is counterintuitive and not supported by the line of case law which addresses such whistleblower, public policy interests. Cythia Cooper of WorldCom, Coleen Rowly of the FBI, and Sheron Watkins of Enron, all whistleblowers, were selected as TIME's Person of the Year for 2002. They were all similarly situated to the appellant in that they filled middle management positions, reported their respective employer's violations of the law, and they were not in a position to cure their employer's illegal acts. The respondent did not provide case law to support their bald assertions associated with whistleblower claims being barred by the employer-middle management employee relationship, contrary to the holdings in *Boyle V. Vista Eyewear, Inc., Id.*;

Dake V. Tuell, Id.; *Adcock V. Newtec, Id.* This court should note appellant did not have the authority to cure respondent's violations of the law related to the whistleblower issues raised by appellant. Only the city council could authorize expenditures to cure the whistleblower issues.

The legally unsupported position of the respondent was further addressed by the Western District's decision in *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522 (Mo.App.W.D. 1994), which was the second Missouri appellate case to fall within the whistleblowing exception to the at-will employment doctrine. In *Clark*, the Court reviewed several cases from other states that found that "at-will" employees that report misconduct by their employers are protected by the public policy exception. *Id.* at 525-26. The Court expressly stated that it was following the holding in *McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21 (Or. Ct. App. 1984), which held that an employee who had a "good faith belief" that her employer was engaging in illegal conduct was protected from discharge. 872 S.W.2d at 527.

For the above stated reasons, the trial court's ruling must be remanded for further trial proceedings due to their having jurisdiction over all counts in this case and failing to exercise that jurisdiction for the claims were not "inextricably intertwined" to lead to their collective dismissal.

IV.

THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN SUSTAINING

RESPONDENT'S MOTION TO DISMISS APPELLANT'S CLAIMS UNDER THE PREMISE APPELLANT HAD NO PRIVATE CAUSE OF ACTION FOR A WRONGFUL TERMINATION CLAIM (COUNT II) THROUGH THE THIRD AMENDED PETITION

Respondent cited *J.M.F. V. Emerson*, 768 S.W. 2d 579, 582 (Mo. E.D. 1989) in support of their dismissal of appellant's Count II in section C. of respondent's Motion to Dismiss. (ROA pp. 59, 60). Respondent argues that there is no private right against respondent for a whistleblower's "wrongful termination".(Count II of the Third Amended Petition). This is clearly contrary to the strong public policy interests addressed *in Boyle* supra. The only conceivable basis for Count II, of the Third Amended Petition, being dismissed by the trial court would presumptively be the trial court's determination that they did not have subject matter jurisdiction or appellant failed to state a claim upon which relief can be granted, with both arguments having been fully addressed in Section I, II. and III supra. These arguments will not be further addressed in this section.

Through the Trial Court affirming appellant's leave to file the Third Amended Petition, (ROA p. 193) respondent's argument that there is no private action against respondent for Count II, is without merit and dismissal of this claim was an abuse of discretion. "Wrongful Termination" of a whistleblower is clearly within the realm of the public policy interests addressed in *Boyle* supra.

APPELLANT'S WHISTLEBLOWER ACTIVITY WAS PROTECTED EVEN IF THE CONCERNS HE RAISED WERE NOT A VIOLATION OF THE LAW

A person bringing a wrongful termination claim based on whistleblowing need not prove that the conduct about which the employee complained actually violated a statute, regulation or constitutional provision.

The overwhelming majority of whistleblowing statutes and case law in the United

States supports the view that the whistleblower must have only a good faith, reasonable belief that the conduct is illegal to support a wrongful termination claim. *See* Eletta S. Callahan & Terry M. Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 120 (2000).[5] The federal Whistleblower Protection Act, 5 U.S.C. § 1201

[5]The following are examples of statutes that require (or have been held to require) only a suspected violation of the law or a reasonable belief that the law has been violated: Alaska Stat. §§ 24.60.035 and 39.90.110; Ark. Code. Ann. § 21-1-603; Cal. Lab. Code § 1102.5; D.C. Code Ann. §§ 1-615.52 and 2-223.01; Fla. Stat. Ann. § 112.3187; Haw. Rev. Stat. § 378-62; Md. Health Occup. Code Ann. § 1-503; Mich. Comp. Laws § 15.362; Miss. Code Ann. § 25-9-171; N.H. Rev. Stat. Ann. § 275-E:2; Okla. Stat. tit. 74, § 840-2.5; Or. Rev. Stat. §§ 659A.203 and 659A.233; 43 Pa. Cons. Stat. § 1422; R.I. Gen. Laws § 28-50-03; S.D. Codified Laws Ann. § 28-1-45.7; Wash. Rev. Code § 42.40.020.

et seq., provides a "reasonable belief" standard and does not require actual proof of a violation before protection begins. That law applies to "any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant *reasonably believes* evidences . . . a violation of any law, rule, or regulation." 5 U.S.C. § 1213 (emphases added). Moreover, at least one federal court in Missouri has interpreted a somewhat ambiguous federal statute as not requiring "tangible evidence of specific violations of any specific law or regulation." *See Haley v. Fiechter*, 953 F. Supp. 1085, 1090 (E.D. Mo. 1997) (holding that the whistleblower provision of the Federal Deposit Insurance Act, 12 U.S.C. § 1831j, did not require proof of a specific statutory violation).

Even more importantly, *every single* Missouri state "whistleblower" statute uses language such as "violation or suspected violation" or "reasonably believes evidences a violation." *See* Mo.Rev.Stat. §§ 105.055, 197.285, 198.070, 198.090, 217.410, 630.167, 660.300, 660.305, 660.608. None of these statutes require an employee to prove that a violation has actually occurred–only that he or she suspected or reasonably believed that a violation had occurred. The Missouri legislature has made it clear that the public policy of Missouri is to encourage employees to report suspected violations of the law, and to extend legal protections to employees who do so in good faith, regardless of whether the conduct actually violates the law.

Appellant presented sufficient evidence to the trial court to demonstrate that he had a good faith, reasonable belief that respondent was engaging in illegal activity, which is all that he was required to prove in his wrongful termination claim under Missouri law. Accordingly, appellant respectfully requests that this Court reverse the trial court's decision to grant respondent's motion to dismiss appellant's claims that he was wrongfully retaliated against and was wrongfully terminated in violation of public

policy for blowing the whistle on respondent's illegal activity.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this Court concur with the Court of Appeals ruling in reversing the trial court's entry of an order sustaining respondent's motion to dismiss appellant's claims. Further, appellant respectfully requests that he be given the opportunity to present oral argument on the extremely important issues presented to this Honorable Court and any other remedy deemed proper by this Court.

Respectfully Submitted,

By:_____

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's brief complies with the limitations set forth in Rule 84.06. According to the word count function of Corel WordPerfect 9, the foregoing brief contains 12,404 words.

The undersigned also certifies that the floppy disk filed with appellant's brief has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

The undersigned certifies that on September 19, 2005, one copy of Appellant's Brief to opposing counsel, and one original and ten copies and one floppy disk to the Missouri Supreme Court containing Appellant's Substitute Brief which was sent via hand delivery Monday to the Supreme Court in Jefferson City, Missouri and via regular mail to opposing counsel:

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_____
Donald K. Murano, Esq. # 36953

IN THE MISSOURI SUPREME COURT

GENE R. KUNZIE	)	
	)	
Appellant,	)	
	)	
V.	)	
	)	Case. No. SC87022
CITY OF OLIVETTE	)	
	)	
Respondent,	)	

APPELLANT'S SUBSTITUTE BRIEF APPENDIX INDEX

Comes Now Gene R. Kunzie, Appellant, who provides this Honorable Court an index of the Appendix:

Respectfully Submitted,

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